

**APPENDIX G – TRANSPORTATION IMPACT FEE
REIMBURSEMENT – LEGAL OPINION**

Appendix G is comprised of a 15-page legal opinion from Martin L. Leitner and Elizabeth A. Garvin, Legal Consultants, of the firm Freilich, Leitner & Carlisle. Questions 1 and 2 on page 1 address reimbursement. Responses, appearing on pages 10 through 13, state that reimbursement may occur in the amounts of 24.2% for roadway projects and 100% for bike path projects.

MEMORANDUM
Freilich, Leitner & Carlisle

Date: January 5, 1994

To: Mark Rosch, Acting Capital Improvements Coordinator, Lorenzo Aghemo, Planning Director, and David Koppel, Director of Engineering, Monroe County, Florida

From: Martin L. Leitner and Elizabeth A. Garvin, Legal Consultants

Subject: Transportation Facilities Impact Fees

QUESTIONS PRESENTED

1. Whether Fair Share Transportation Impact Fees ("transportation impact fees") already collected by the County pursuant to § 9.5-491 of the Land Development Regulations of Monroe County ("LDR's") between 1986 and 1992 but not spent may be used to proportionately reimburse the County gas tax fund for gas tax fund monies expended on transportation improvement projects during the same time period that would have been eligible for transportation impact fee funding when undertaken? If so, what limitations, if any, would need to be applied to reimbursements (transfers of funds) from the transportation impact fee fund to the gas tax fund to ensure that applicable legal requirements are met? Are there restrictions on the specific projects or categories of projects that can be funded? Are there limitations on the amount of funding that can be allocated to each project due the extent, if any, to which the project is needed to correct an existing deficiency?
2. Whether "transportation impact fees" already collected by the County pursuant to § 9.5-491 of the LDR's between 1986 and 1992 but not spent can be used to

proportionately reimburse the County gas tax fund for gas tax fund monies spent on bike paths during the same time period that may have been eligible for transportation impact fee funding when undertaken?

3. Whether it is necessary/desirable to use transportation impact fee funds collected from 1986 to 1992 or subsequently for the Card Sound Road Project, since the project has been fully funded with revenue bonds?

4. Whether the County can use transportation impact fee funds to match federal and/or state funding for improvement projects/upgrades on U.S. 1 in order to advance the priority of such projects despite the fact that (a) § 9.5-491 of the LDR's restricts the use of transportation impact fees to the "major road network system" in Monroe County? ("Major road network system" is not defined; however, there is express authorization for use of impact fee funds for projects outside of the district where collected on U.S. 1, Card Sound Road and C-905 in Key Largo.); and (b) Resolution No. 497-1992 establishing the schedule of transportation facilities impact fees restricts the use of the impact fees to "transportation improvement projects for collector roads, intersections of County roads with U.S. 1 and bike trails."

DISCUSSION

I. Reimbursement of the General Fund

A. Introduction

In 1986, Monroe County implemented a system to collect proportionate share transportation impact fees from new developments which created additional transportation demand on the Monroe County transportation system.¹ Fees collected pursuant to the regulations were earmarked for the funding of transportation

¹ "Fair Share Transportation Impact Fee," Monroe County Land Development Regulations, § 9.5-491 (1986).

improvement projects to the "major road network system" in the County, including the upgrade of Card Sound Road. Based upon the then current estimate of the cost to upgrade Card Sound Road, as calculated by the transportation consulting firm under contract to the County, the County retained and accumulated a certain amount of the transportation impact fee funds collected specifically for the Card Sound Road project. When the project was opened for bids just a few months ago, it was discovered that the resulting bids were substantially lower than had been projected.² As a result, the County has a substantial surplus of retained transportation impact fee revenues which have not been expended nor allocated to any specific transportation improvement project.

B. Legal Basis

The Fair Share Transportation Facilities Impact Fee program was designed to meet the rational nexus test required of all impact fees in Florida. This test was summarized in *Hollywood, Inc. v. Broward County*, 431 So.2d 606, 611-12 (Fla. 4th D.C.A. 1983):

[T]he local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditure of the funds collected and the benefit accruing to [the development].

² The Card Sound Road improvement project was originally estimated to cost \$9.6 million with the intent to fund one-half (\$4.8 million) with revenue bonds and one-half (\$4.8 million) with transportation impact fees. In January 1993, the County authorized the issuance of \$4,585,000 in Card Sound Road and Bridge Improvement Revenue Bonds, Series 1993. When bids on the improvement project were opened in late 1993, it was discovered that the project costs had been substantially over-estimated and that the bids were, in fact, less than one-half of the originally estimated costs. The Board of County Commissioners has already awarded the construction contract to the low bidder at a cost of \$3.1 million.

In the case of the transportation impact fees, the nexus between the additional population and the need for new transportation facilities was incorporated into the methodology used to determine the amount of the fee.³ The nexus between the funds collected and the benefit accruing to the new development was reflected in the earmarking of the funds, pursuant to the adopting ordinance, to limit their use specifically to designated types of projects *i.e.*, improvements to the major road network system, which were predetermined to benefit new development. *Contractors & Builders Association v. City of Dunedin*, 329 So.2d 314, 321 (Fla. 1976) (ordinance must "spell out necessary restrictions on the use of fees it authorizes to be collected"). Although not expressly stated in the *Hollywood Inc. v. Broward County* case, it is recognized that an attribute of the rational nexus or "reasonable relationship" test is that there is a reasonable connection between the time when the impact fees are collected and the time when they are expended on a project benefitting the development paying the fees. Despite this caveat, generally, once the impact fees are collected and properly earmarked by being placed in a segregated account or fund, expenditure of the funds is left to the discretion of the collecting governmental entity. Accordingly, the decision to spend the

³ See *e.g.*, Draft Transportation Facilities Impact Fee Report for Monroe County, Florida, submitted to the County on August 31, 1992 by Freilich, Leitner, Carlisle & Shortlidge. Although we do not have access to the methodology report prepared prior to the adoption of the Fair Share Transportation Impact Fee Ordinance in 1986, we presume that it reflected a similar methodology and met this aspect of the rational nexus test.

funds within the time period designated by the impact fee ordinance belongs to the County.

Some commentators have expressed the view that impact fee funds must be spent within 5 to 6 years--the conventional capital improvements programming period--in order to meet the rational nexus test. This view has been reinforced by the fact that State impact fee enabling legislation in many states addresses this issue. For example, the Georgia legislation provides that funds must be refunded to the property owner if not encumbered within six (6) years. Ga. Code. Ann. § 36-71-9(1)(Supp. 1992). The Nevada legislation requires that impact fees must be refunded upon request of the property owner if construction is not initiated within five (5) years or fees are not expended within ten (10) years.⁴

Where no state legislation is in effect, greater discretion is left to the local government. However, based on a comprehensive review of state enabling legislation, the key to a legally valid time period may be more closely related to the size and scale of the capital improvements project (*i.e.*, a major transportation, water, sewer or storm drainage project which takes many years for the conceptualization, programming, planning, design, engineering, land acquisition and construction, may require more time than a smaller, less expensive and less complex improvement project) and the time when the impact fee funds are "encumbered," rather than when they are expended.

⁴ Leitner & Schoettle, *A Survey of State Impact Fee Enabling Legislation*, 25 URB. LAWYER 3 (Summer 1993) at 491-518.

One of the limitations on the usefulness of impact fees is that because they are dependent upon new development, the amount and timing of new development dictates the rapidity with which sufficient fees will be collected for particular improvement projects. If only some new development occurs in a particular area and fees are collected, but these are inadequate to fully fund the contemplated improvement, the local government must defer the improvement project, thereby triggering the issue of the time period between collection and expenditure of the impact fees; or supplement the impact fee funds with other County general funds; or refund the impact fees collected to date. While none of these options is perfect, supplementing the impact fee funds with County general funds is palatable if the general fund can subsequently be reimbursed when additional development occurs and impact fees are paid. Clearly, the payor of the impact fees has no complaint since he is being provided with the contemplated improvement within the specified time period and, therefore, receives benefit.

C. Refund Provisions

The Fair Share Transportation Impact Fee (§ 9.5-491(i)(3)(d) of the LDR's) specifies that fees collected shall be subject to refund if an application for a refund is made within one (1) year following the end of the sixth year from the date on which the fee was paid. This provision operates in effect as a statute of limitations within which refund applications must be made; however, it does not spell out, except by implication, when impact fee funds must be spent. Section 9.5-491(i)(3)(f) and (g) of the LDR's provides

that the refund application shall be approved if the Planning Director determines that the impact fees collected from the applicant for the refund have not been "spent or encumbered" within six (6) years from the date of the fee payment. (Note that the word "encumbered" is not defined.)⁵

Since the fair share transportation impact fee ordinance was adopted on September 15, 1986, and the first fees were collected on October 1, 1986, a worst-case scenario would result from the failure of the County to expend or encumber any impact fee funds collected by October 1, 1992 (6 years from the earliest date on which any impact fee payment was made).

A review of information provided by Melonie Bryan, Director, Office of Management and Budget of Monroe County⁶ reveals that no transportation impact fee funds collected were expended in the five (5) FY's 1987-1991. In FY 1992, funds were expended in all transportation impact fee subdistricts with the exception of Key Colony Beach.⁷ However, the amount of funds expended was very small compared with the impact fee revenues collected over the first six (6) fiscal years, 1987-1992, i.e., approximately \$70,000 was expended in all subdistricts, although close to \$7.5 million had been collected.

⁵ We have had occasion in the past to define the word "encumber." See Memorandum titled " (Freilich, Leitner & Carlisle, Date:).

⁶ Summary of Impact Fees (Revenues, Expenditures, Balances) By Facility and By Impact Fee Subdistrict (where applicable), Effective September 30, 1993.

⁷ Through September 30, 1993, no transportation impact fee funds have been expended by Key Colony Beach.

approximately \$70,000 was expended in all subdistricts, although close to \$7.5 million had been collected.

The principal reason for not expending impact fee revenues was to accumulate a sufficient amount to defray at least one-half of the estimated cost of the Card Sound Road and Bridge project, which was originally estimated to cost \$9.6 million.

In addition to Card Sound Road, the County initiated not less than 28 transportation improvement projects⁸ utilizing constitutional gas tax⁹ and county gas tax¹⁰ revenues between 1987 and 1993 which could have been funded, at least in part, with transportation impact fees. There are limitations on the use of constitutional gas tax and county gas tax funds but, if impact fee funds were used to supplement gas tax funds for projects undertaken between 1987 and 1993, it would have released a significant portion of the gas tax funds, which then could have been used for additional transportation improvement projects.

Since impact fee funds could have been used in place of gas tax funds, it is essential to establish the total cost of each of the 28 transportation improvement projects and the percentage of the project costs that can legitimately be funded with impact fees, *i.e.*, that percentage of the project cost attributable to new growth (versus that percentage

⁸ See "Potential Reimbursement Projects Completed/Underway" provided to Freilich, Leitner & Carlisle by David Koppel, Director of Engineering, Monroe County, on November 24, 1993.

⁹ Fla. Stats. §§ 206.41 and 206.47.

¹⁰ Fla. Stats. § 206.60.

attributable to serving the needs of existing residents).¹¹ As noted in footnote 11, the applicable new development share of each transportation project is 24.2%. As noted in footnote 12, however, the applicable new development share for bike path projects is 100%. Thus, in order to determine the amount of impact fee revenues that could have been expended on transportation projects from 1986 to date, the County will have to calculate the total cost of each project and then multiply by 24.2% for transportation projects and by 100%¹² for bike path projects. The resulting amounts then also represent the amount of gas tax revenues that would be freed up for use on other eligible projects.

¹¹ The methodology for development of a legally-valid impact fee ordinance must assure that improvement projects which are designed only in part to serve new growth demands and in part to serve existing development have costs proportionately allocated between the two. In Monroe County, the 1992 transportation impact fees relied on a methodology, which related then current County functional population (98,963) to projected future functional population in 2010 (130,574) (the comprehensive plan horizon date). Projected new population (1992-2010) (31,611) was determined to be 24.2% of total projected functional population in 2010 (while existing 1992 population was determined to be 75.8%). While this methodology was used in the 1992 transportation impact fee ordinance (not in the 1986 ordinance), the difference between the proportion in 1992 and 1986 is not considered to be significant. Moreover, the impact fee expenditures are being made now.

¹² Bike path/trail projects undertaken after 1986 are 100% attributable to new development. The 1992 transportation impact fee methodology established that the County was providing 1.9 linear feet of bike paths per capita, which was established as the level of service standard. Therefore, there were no existing deficiencies and all additional bike paths would be needed to serve projected new growth.

D. Response to Question #1

Transportation impact fee revenues already collected pursuant to § 9.5-491 of the LDR's between 1986 and 1992 but not yet spent may be used to now reimburse the County gas tax fund for gas tax fund revenues expended during that time period on eligible projects provided that:

- (1) the amount of reimbursement shall be limited to 24.2% of the project costs for transportation projects, which represents the proportionate share attributable to new development projected to 2010 (the comprehensive plan horizon year);
- (2) the amount of reimbursement for bike path project costs shall be 100%.

E. Response to Question #2

Transportation impact fee revenues already collected pursuant to § 9.5-491 of the LDR's between 1986 and 1992 but not yet spent may be used to now reimburse the County general fund for general fund revenues expended during that time period on eligible bike paths/trails projects.

Both § 9.5-491 of the LDR's and Resolution No. 497-92 list new bicycle paths as eligible improvement projects for use of impact fee revenues. See § 9.5-491(i)(3)(ix) with respect to the 1986 Fair Share Transportation Impact Fee Ordinance and Resolution No. 497-92 and Draft Transportation Facilities Impact Fee Report for Monroe County, Florida

(August 31, 1992) at pp. 5-6, 14-15 and 16. The methodology for calculating the "fair share" transportation impact fee in 1986 is not available; therefore, we do not know what level of service standard was used nor how much of the impact fee amount was for bike trails versus other transportation improvements.

Fortunately, in 1992, the new transportation impact fee ordinance was based expressly on two (2) components which were independently calculated; one was bike trails (the other being all other transportation improvements). The calculation methodology established that the existing level of service in 1992 was 1.9 linear feet of bike-trail per capita. It then adopted that same level of service for projected growth anticipated between 1992 and 2010 so that the level of service would not be diminished over time. In this way, 100% of the costs could be legitimately and validly attributable to new growth.

If the 1986 fair share transportation impact fee methodology could be reconstructed, it would be possible to determine the exact percentage of bike trail costs to be attributable to new growth between 1986 and 1992. In order to do this, the County would need to establish the number of miles of bike trails in 1986, the County functional population in 1986, the resulting level of service standard measured in linear feet of bike path per capita, the bike trail cost per linear foot, and the persons per household in 1986. If this information is available and the calculation can be done, it would establish the percentage of bike trail costs attributable to new growth. Bike trail projects initiated between 1986 and 1992 and funded with gas tax funds could then be identified and

appropriate reimbursement could be made from the impact fee fund to the County general fund.

According to the project list forwarded by David Koppel, Director of Engineering (see footnote 8, *supra*), the following projects had bike trail components:

1989	Aviation Blvd. Bike Path (Marathon)
1990	U.S. 1 Bike Path (Plantation Key)
1990	Woods and Gardenia Bike Path (Plantation Key)
1992	Cross St. and 5th St. Bike Path (Stock Island)
1992	Sugarloaf Blvd. Bike Path (Sugarloaf Key)
1993	Sombrero Blvd. Bike Path (Marathon)
1993	U.S. 1 - Marathon Bike Path (Marathon)

Gas tax revenues may be used for bike paths and trails and were, in fact, fully used to fund 100% of the project costs, despite the fact that the projects are 100% attributable to demands generated by new development. Therefore, the County may and should reimburse the gas tax fund for 100% of the costs of the above-listed bike path projects out of accumulated but unspent and unencumbered transportation impact fee revenues. Moreover, the County should identify additional bike path projects in the current (1994) FY budget, in the 1995-1999 capital improvements program, and in the Monroe County Seven-Year Roadway/Bicycle Path Plan. The County should consider the following:

- (1) adding projects as needed in the 1995-1999 capital improvements program so as to maintain the 1.9 linear feet per capita standard based on development projections to 2010 and enabling all of such projects to be initiated by 1999; and
- (2) shifting (advancing) projects currently in the 1995-1999 capital improvements program to the current FY to the extent possible to immediately encumber the impact fee funds needed for such projects.

After identifying the actual costs of the above-listed and described projects, we can determine the amount of the previously collected impact fee revenues which can be encumbered to avoid refunds.

F. Response to Question #3

Because the Card Sound Road and Bridge project is primarily needed to serve hurricane evacuation demands resulting from new development, use of previously collected but expended transportation impact fee revenues to fund the project is permissible. The real question though is whether such reimbursement would be effective, i.e., will it allow the use of accumulated impact fee revenues to fund a portion of the cost of the project rather than toll receipts and then permit the transfer of the collected tolls to be used to reimburse the gas tax fund, or, better yet, the County general fund. If so, the County would gain \$3.1 million plus (the cost of the Card Sound Road project) for the gas tax or general fund. However, the project is currently fully funded by revenue bonds backed by tolls and related project revenues, not by County general fund or gas tax or impact fee revenues.

The key issue to be resolved in response to Question #3 is whether, pursuant to the Card Sound Road and Bridge Improvement Revenue Bonds, Series 1993, the toll revenues can be used for a purpose other than debt retirement assuming that the debt is retired by other revenues. Since we are not Bond Counsel, we have not attempted to answer this question; nor, to indicate any opinion as to whether such a change might

affect the tax exempt status of the bonds; nor to indicate an opinion about a myriad of other potential legal issues associated with such a change.

If the bonds have been authorized,¹³ but not issued and the project costs are now financed largely with accumulated impact fee revenues, can the County still collect tolls? Are there any restrictions imposed by the State or federal government on the ability of the County to utilize toll revenues for purposes other than operation and maintenance of the project? *If possible, and subject to confirmation by Bond Counsel and other appropriate County consultants, staff and officials, we recommend that the proportionate share of the cost of the Card Sound Road and Bridge improvement project attributable to new development be funded by accumulated impact fee revenues and that toll and other revenues from the Card Sound Road and Bridge improvement project be placed in the County general fund.*

If the bonds have been authorized, but are now rescinded in light of the significant change in project costs, the County can fund the project 50% with accumulated impact fee revenues and 50% with accumulated gas tax revenues (including gas tax revenues freed-up by virtue of the use of impact fees for past and current transportation and bike path projects). The issue that is then raised is what the toll revenues would be used for if not for debt retirement. However, that issue is beyond the scope of this Memorandum (and the request by County staff).

¹³ The bonds were authorized by a resolution adopted by the Board of County Commissioners on January 13, 1993, as amended and supplemented. See Bond Prospectus, p. 1.

G. Response to Question #4

The County may use transportation impact fee revenues to match federal or state funding for improvement projects on U.S. 1 in order to advance the priority of such projects on State or federal capital program lists subject to the following:

- (1) the project is part of the "major road network system" as that term is used in § 9.5-491 of the LDR's; or
- (2) the project is part of an intersection improvement of any County road with U.S. 1 pursuant to Resolution No. 497-92. "Intersection improvement" may be subject to a broad interpretation to allow for the addition of, for example, left and right turn lanes on U.S. 1, medians, traffic signals, signage, landscaping, widenings, right-of-way acquisition, curb and gutter, sidewalks, drainage improvements, utility relocations, etc. However, "intersection improvement" would, presumably, be subject to some limitation related to distance from the intersection. And, more importantly, "intersection improvement" could not be considered expansive enough to include such things as the addition of a third travel lane for an extensive distance between intersections.

If the County perceives that the use of impact fee funds for this purpose is important and desirable, consideration should be given to revising the current transportation impact fee calculation methodology, to amending Resolution No. 497-92, to amending the current FY 1994 County Annual Budget and FY 1995-1999 Capital Improvements Program and to revising the Seven Year Roadway/Bicycle Path Plan.